No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1941

PETER YOUNG, ALIAS YOUNG LUP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In the memorandum previously filed on behalf of the United States the Government took the position that Section 6 of the Harrison Anti-Narcotic Act was not so unambiguous as to preclude resort to administrative interpretation in determining its meaning. The administrative construction was reviewed at pages 6–7 of our memorandum and tended to support the view that the second proviso of Section 6, dealing with the keeping of records of dispensations of limited content narcotic preparations, constitutes a condition precedent to the exemption created by that section, rather than an independent requirement for violation of which the defendant might be convicted. The Department

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of Justice has since been advised by the Treasury Department that information previously furnished regarding the practice of the Bureau of Narcotics was not entirely accurate, and the Treasury Department requested a reconsideration of the problem. Such a reconsideration has been given, and upon the basis thereof the Government desires to withdraw so much of its previous memorandum as indicates that it would be unwilling to support the conclusion reached by the Circuit Court of Appeals as to the independent and affirmative character of the proviso of Section 6.

Reconsideration of this case, however, has strengthened our belief (Memorandum for the United States, p. 8) that the second proviso of Section 6, even though it be regarded as an independent requirement, has no application to a physician who administers exempt narcotics solely to patients upon whom he personally attends. The language of the proviso imposes the record keeping requirement upon "any manufacturer, producer, compounder, or vendor (including dispensing physicians)." The words "dispensing physicians" in this connection may be reasonably interpreted as applying only to physicians dispensing to persons other than patients upon whom they personally attend, e. g., country doctors who may act as druggists, physicians who engage in the manufacture and general distribution of patent medicines. An interpretation of the proviso which limits it to this type of situation makes it harmonize with Section

2 (a) where, in dealing with true narcotics, Congress unequivocally stated its intention to exempt physicians from record keeping when in personal attendance upon patients. That the Treasury Department entertains the same view as to the construction of the proviso is apparent from the attached letter from the Acting General Counsel.

The evidence in this case was undisputed that the accused gave the preparations in question to patients upon whom he was in personal attendance (R. 269, 270, 271, 272, 274, 275), and omitted to keep records because of his understanding that physicians were not required to do so under these circumstances (R. 249–250, 277, 286–288). Petitioner's requested Instruction 15, embodying this view, was refused (R. 47–48).

Accordingly, the Government adheres to the conclusion of its prior memorandum, but does so solely for the reasons in this memorandum set forth and not on the ground that the second proviso to Section 6 is not an independent and affirmative requirement for the keeping of records.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
LOUIS B. SCHWARTZ,
W. MARVIN SMITH,
Attorneys.

DECEMBER 1941.

APPENDIX

GENERAL COUNSEL, TREASURY DEPARTMENT,
Washington, November 29, 1941.

MY DEAR MR. SOLICITOR GENERAL: This will confirm my advice by telephone today to Mr. Louis B. Schwartz, Department of Justice, that it is the position of the Department of the Treasury that, as a matter of law, the phrase "including dispensing physicians" within the parentheses in the second proviso to section 2551 (a) of the Internal Revenue Code does not include physicians dispensing exempt preparations in circumstances which, under section 2554 (c) (1) of the Internal Revenue Code, would except physicians dispensing ordinary narcotics from the record keeping requirements therein.

Very truly yours,
(Signed) HUNTINGTON CAIRNS,
Acting General Counsel.

The Honorable, The SOLICITOR GENERAL OF THE UNITED STATES.

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 86.—October Term, 1941.

Peter Young, alias Young Lup, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1942.]

Mr. Justice Murphy delivered the opinjon of the Court.

Petitioner, a practicing physician, was convicted on eight counts of an indictment charging violation of Section 6 of the Harrison Anti-Narcotic Act as amended.[1] That section, so far as here material, provides:

"That the provisions of this Act shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium . . . in one fluid ounce . . . : *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intention and provisions of this Act: *Provided further*, that any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound and vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies . . . ."

The evidence is undisputed that petitioner gave the preparations in the quantities charged in the indictment to patients whom he personally attended. He kept no records. His defense, that the second proviso of Section 6 is not an independent and affirmative requirement but merely a condition precedent to the exemption created by that section, was rejected by the court below which took the position that the second proviso is an unconditional requirement that all vendors of exempt preparations keep records.[2]

[1] 40 Stat. 1132, 26 U. S. C. Supp. V, sec. 2551(a) and (b).

[2] 119 F. 2d 399.

The Government confessed error and we brought the case here. 314 U. S. —.

The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. See *Parlton* v. *United States*, 75 F. 2d 772. The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers. Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties. Cf. *Rex* v. *Wilkes*, 4 Burr, 2527, 2551, 98 Eng. Rep. 327; *State* v. *Green*, 167 Wash. 266, 9 P. 2d 62.

The Government's confession of error was originally two-fold: first, that while the second proviso of Section 6 was subject to two possible constructions, the administrative construction had been that it was not an independent penal provision, and therefore the ambiguity should be resolved in favor of petitioner; and, secondly, that the second proviso, even if it be regarded as an independent penal provision, does not apply to a physician who administers exempt preparations solely to patients whom he personally attends. Upon reconsideration the Government has withdrawn its first ground of confession of error. We put to one side that question since we are of opinion that there must be a reversal on the second ground.

Assuming, without deciding, that the second proviso of Section 6 is an independent penal provision, it requires that records be kept only by "any manufacturer, producer, compounder, or vendor (including dispensing physicians)". We think that Congress, by the use of the words "dispensing physicians", meant to exclude physicians administering to patients whom they personally attend.

That not all physicians are required to keep records is manifest from the use of the qualifying adjective "dispensing". And, the physician must be one who manufactures, produces, compounds, or vends, or possibly only one who vends if the parenthetical phrase

applies only to "vendor", the drugs. These are not appropriate words to describe the function of a physician who administers exempt preparations to patients whom he personally attends.

This construction is borne out by a consideration of the Act as a whole. The word "administer" more appropriately describes the activities of a doctor in personal attendance than does the word "dispense". Admittedly the words "dispense" and "dispensing" are used in several senses in the Act, but Congress evidently was aware of the differentiation between "administer" and "dispense", for, when it wished to include all possible functions of physicians with respect to drug distribution, it used both terms in conjunction. Section 1 of the Act in defining those required to pay a special tax speaks of "physicians . . . lawfully entitled to distribute, dispense, give away, or administer," and makes it unlawful for any person "to purchase, sell, dispense or distribute" any drugs otherwise than in and from the original stamped package, excepting the "dispensing, or administration, or giving away of any of the aforesaid drugs to a patient" by a practitioner where "dispensed or administered to the patient for legitimate medical purposes."

Section 4 exempts from the prohibition of interstate shipments and deliveries of drugs by persons who have not registered and paid a special tax deliveries by "any person who shall deliver any such drug which has been prescribed or dispensed by a physician." The omission of the word "administer" indicates that Congress recognized that shipments and deliveries would ordinarily not be involved where the physician was administering while in personal attendance.

In Section 2(a), dealing with true narcotics, Congress unequivocally exempted physicians from record keeping where in personal attendance upon patients. It is difficult to perceive why a different requirement should obtain when a physician, under similar circumstances, administers preparations containing only a limited amount of narcotics, such as the paregoric, cough syrup, etc., involved in this case. The word "dispense" is evidently used in Section 2(a) in a sense broad enough to include personal administration of drugs by an attending doctor, but the express exception of the personal attendance cases removes any ambiguity as to the scope of "dispense" in this context.

The construction of the parenthetical phrase "(including dispensing physicians)" as encompassing only doctors who would be

covered by the word "vendor" does not imply that Congress was tautologic, but rather that it acted cautiously to preclude any contention that physicians selling drugs were not "vendors" because of their professional status.

The legislative history of the second proviso of Section 6 supports the view that the words "dispensing physicians" were intended to apply only to physicians acting as dealers in the sale of drugs. The phrase "vendor (including dispensing physicians)" was substituted for "the dealer who knowingly sells" exempt preparations.[3]

Upon the evidence in this case petitioner was not a "dispensing physician" within the meaning of the second proviso of Section 6. The judgment is reversed and the cause remanded to the United States District Court for the Territory of Hawaii for such further proceedings as may be required in the light of this opinion.

It is so ordered.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[3] See 57 Cong. Rec. 771 and H. Rept. No. 1037, 65th Cong., 3d Sess., pp. 37, 87-88.

In offering the committee amendment which embodied the record keeping requirement Senator McCumber said:

"Before the committee there was a proposition made compelling druggists who compounded any of these habit-forming drugs also to keep a list of the persons to whom they furnished them, a list of the goods, and so forth." 57 Cong. Rec. 771.